Supreme Court, U.S.
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No. 91-1673

In the
Supreme Court of the United States

OCTOBER TERM, 1991

ELAINE A. CONNORS,
PETITIONER,

v.

HOWARD JOHNSON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE ISSUE

Whether the Massachusetts state courts' action in granting and upholding judgment notwithstanding the verdict and denying further appellate review of that action violated either the Seventh Amendment or the Due Process Clause of the Fourteenth Amendment?

RULE 29.1 LISTING

The respondent Howard Johnson Company, now known as Marriott Family Restaurants, Inc., is a wholly owned subsidiary of Marriott Corporation. Its non-wholly owned subsidiaries are Marriott Family Restaurants, Inc. of Illinois; Marriott Family Restaurants, Inc. of Vermont and Marriott's Bickford's Family Fare, Inc.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Mrs. Connors, as administratrix of the estate of Paul Beckner ("Beckner"), brought this action in 1981 for damages for breach of contract, breach of trust and misappropriation of trade secrets, alleging that the respondent Howard Johnson Company ("Howard Johnson") continued to use ice cream formulas originally developed by Beckner after his death in 1968. After a jury returned a verdict for the estate, judgment notwithstanding the verdict was entered for Howard Johnson on the grounds that the applicable statutes of limitation had expired and that the written contract between Beckner and Howard Johnson imposed no limitation on future use of the formulas.[1] On appeal, the Massachusetts Appeals Court affirmed the judgment, holding that the evidence established that Howard Johnson's use of the formulas was with Beckner's consent and that there was no evidence that Beckner had limited Howard Johnson's right to use the formulas after his death, thus precluding recovery under any of the theories advanced. Mrs. Connors sought discretionary further appellate review from the Massachusetts Supreme Judicial Court, which was denied.

REASONS FOR DENYING THE WRIT

The Supreme Court should deny certiorari because the specific federal constitutional issues raised in the petition were not presented in a timely manner to the

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[1] The other opinions cited at pp. 1-2 of the petition refer to denial of a motion to dismiss in 1982, denial of a motion for summary judgment in 1986 and a ruling on a discovery motion in 1985. These nondispositive rulings are of no relevance to any issue possibly before this Court.

Massachusetts state courts. Moreover, there is absolutely no merit to the due process and Seventh Amendment challenges to the judgment notwithstanding the verdict procedure which was the basis of the judgment entered below or the discretionary further appellate review procedure used in Massachusetts. In addition, the petition seeking a writ of certiorari was not timely filed with this Court.

I. BECAUSE NO FEDERAL QUESTION WAS TIMELY RAISED IN THE STATE COURT PROCEEDINGS, SUPREME COURT REVIEW IS NOT AVAILABLE.

The federal constitutional issues Mrs. Connors seeks to raise in her petition were never presented in a timely fashion to the Massachusetts courts.[2] 28 U.S.C. §1257 (1988), which governs Supreme Court review of state court decisions, provides jurisdiction to review such decisions not involving the validity of a statute only when a constitutional right "is specially set up or claimed". The failure to raise a federal question below bars its review by the Supreme Court. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Association, Inc., 360 U.S. 334, 342 n.7 (1959).*

In this case no hint of any federal constitutional claim was raised in the trial court, the direct appeal from

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[2] The petition ignores completely Supreme Court Rule 14.1(h), which requires citations to the specific proceedings at which the federal questions sought to be resolved were raised.

the judgment notwithstanding the verdict, or the request for further appellate review from the Massachusetts Supreme Judicial Court. The first specific mention of any federal issue was a reference to the Seventh Amendment in a motion directed to Justice Souter of this Court dated February 3, 1992, requesting a further extension of time to file a petition for certiorari.

In a July 17, 1991 letter from Mrs. Connors to the Chief Justice of the Massachusetts Supreme Judicial Court, which was treated as a motion for reconsideration from the denial of further appellate review, there was a general request to "grant me my rights under the Constitution of the United States." That is the only reference anywhere in the state court proceedings to the federal Constitution. Even if such a generic reference to the Constitution were considered sufficiently specific to raise the federal questions now sought to be presented, the Massachusetts courts would not consider them because they were not timely raised below. *Paro v. Longwood Hospital, 369 N.E.2d 985, 989 n.9 (Mass. 1977).* Similarly, this Court has ruled that a timely motion for rehearing of the final state appellate decision on the merits is too late to raise a federal question sufficient to invoke Supreme Court jurisdiction. *Hanson v. Denckla, 357 U.S. 235, 243-244 (1958).* The untimely and unauthorized motion for reconsideration from the denial of discretionary Supreme Judicial Court review which occurred here was even more obviously too late to preserve any federal question. Accordingly, there is no jurisdiction to issue a writ of certiorari.

II. THERE IS NO MERIT TO THE FEDERAL CLAIMS PETITIONER SEEKS TO ASSERT.

Petitioner's procedural due process and Seventh Amendment challenges to the judgment notwithstanding the verdict procedure used in this case are completely without merit. Rule 50(b) of the Federal Rules of Civil Procedure does not violate the Seventh Amendment's guarantee of a jury trial. *Neely v. Eby Construction Company, 386 U.S. 317, 321 (1967).* The Massachusetts judgment notwithstanding the verdict procedure is the same as the federal procedure approved in *Neely*. Petitioner also erroneously claims that there is no common law basis to support the judgment notwithstanding the verdict procedure. To the contrary, the same result was achieved under the common law by the judge reserving ruling on a motion for directed verdict and then sending the case to the jury. Rule 50(b) of the Federal Rules of Civil Procedure merely codified this long standing procedure which "undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment". *Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 660 (1935).*

Similarly, there is no basis for a federal Constitutional challenge to the Massachusetts practice of limiting Supreme Judicial Court review of cases decided by the intermediate appellate court. The federal and Massachusetts courts agree that the right to appeal is strictly statutory. *Raytheon Manufacturing Co. v. Radio*

Corporation of America, 76 F.2d 943, 946 (CA 1), aff'd, 296 U.S. 459 (1935); *Turgeon v. Turgeon,* 113 N.E.2d 821, 824 (Mass. 1953). The Massachusetts legislature, when it created the intermediate Appeals Court, expressly provided that "there shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by that court, except. . . (b) where leave to obtain further appellate review. . . is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interests of justice." Massachusetts General Laws, c. 211A, § 11 (1990 ed.). Because further appellate review by the Supreme Judicial Court is expressly made discretionary by statute, there is no basis for a claim of entitlement to Supreme Judicial Court review at all, let alone the full written decision Mrs. Connors seeks.

III. THE PETITION WAS NOT TIMELY FILED.

Mrs. Connors' failure to file a petition for writ of certiorari or request an extension of time to do so within the 90-day limit established by 28 U.S.C. § 2101(c) (1988) deprives this Court of jurisdiction to consider this matter. *Missouri v. Jenkins, 495 U.S. 33, 45 (1990).* As reflected in the copy of the Massachusetts Supreme Judicial Court docket attached to the Petition, Mrs. Connors' Application for Further Appellate Review was denied on June 24, 1991, not November 26, 1991 as she claims. This denial was the final adjudication by the Massachusetts state courts in this matter and therefore established the trigger date for the 90-day filing period. Mrs. Connors' first application for an extension of time

to file her petition for a writ of certiorari in this Court was by letter dated October 18, 1991, almost 30 days after the expiration of the 90-day requirement.

The trigger date of June 24, 1991, was not affected by either the July 17, 1991, or October 27, 1991 letters from Mrs. Connors to the Supreme Judicial Court, which were treated as motions for reconsideration of the denial of further appellate review. Neither letter was a "timely filed" petition for rehearing under Supreme Court Rule 13.4 sufficient to restart the 90-day period for filing a petition for certiorari. While Rule 27 of the Massachusetts Rules of Appellate Procedure provides for a petition for rehearing within fourteen days after the date of the rescript issued in connection with a decision on the merits by appellate courts in Massachusetts, there is no provision for a petition for rehearing with respect to an order denying further appellate review, for which no rescript issues. Moreover, even if the denial of further appellate review was considered the equivalent of issuance of a rescript, so that a petition for rehearing was authorized, Mrs. Connors' first letter was not filed until more than three weeks after the denial and was therefore untimely.

As a result, Mrs. Connors' first request for an extension of time in this Court was untimely under Supreme Court Rule 30.2 because it was not presented within the 90-day period permitted to file the underlying petition for a writ of certiorari. Since this Court has "no authority to extend the period for filing except as Congress permits" (*Missouri v. Jenkins, supra*), the

extensions of time allowed were unauthorized and the petition should be dismissed as untimely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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